RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JUN 4 - 2011
OFFICE OF THE CLERK

No. 10-1313

In The
Supreme Court of the United States

JOHN R. CLELLAN,
Petitioner,

v.

STATE OF OHIO,
Respondent.

APPENDIX

FOR PETITIONER'S REPLY BRIEF

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June 3, 2011

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{A}

CROSS-EXAMINATION OF DEPUTY FELKNER

End of examination by Mr. Sherman:
Transcript at p. 150, lines 14 – 22:

Q. And we have a video, and we don't have the video, and we have no other documentation?
A. Again, the video is not something I control. That's out of my hand. I do not have access to the video.
Q. It's not your job to preserve and maintain evidence?
A. It's not part of my duty to retract the video from cruisers, no.
Q. All right. **Was there anything on it that might have exonerated my client?**
A. **It's possible.**
Q. **Thank you, Deputy. That's all I have, your Honor.**

COMMENT

The sequence of testimony that has been emboldened above does not appear in the filed transcript of proceedings. This passage was either deliberately or accidentally omitted when transcribed. Nowhere else in the transcript does Attorney Sherman conclude questioning without either thanking the witness or addressing the judge. Court reporters in Ohio are not required to be licensed or certified and the Court is not prone to release any recorded materials for verification of transcripts. Affidavits from jury members, participants and/or observers in the courtroom may be provided regarding this matter.

{B} *

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	No. 09AP-1043
Plaintiff-Appellee,	:	(MC No. 2009 CRB 2626)
	:	(Regular Calendar)
	:	
v	:	
	:	
John Clellan,	:	
	:	
Defendant-Appellant.		

MEMORANDUM DECISION
Rendered on February 8, 2011

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, City Prosecutor, Melanie R. Tobias and Orly Ahroni, for appellee.

The Vargas Law Firm, Co. L.P.A., and Edwin J. Vargas; Nicholas A. Panagopoulos II, LLC, and Nicholas A. Panagopoulos II, for appellant.

ON APPLICATION FOR REOPENING

BRYANT, P. J.

{P 1} Pursuant to App.R. 26(B), defendant-appellant, John Clellan, filed on November 15, 2010 an application for reopening of our decision

in State v. Clellan, 10th Dist. No. 09AP-1043, 2010-Ohio-3841, that affirmed his conviction for one count of aggravated menacing in violation of R.C. 2903.21. Defendant premises his application on the failure of appellate counsel to raise two issues which, defendant asserts, create a "reasonable probability the [his] sentence would have been overturned." (Application, 3.) Contrary to defendant's assertions, his application fails to set forth issues which, if raised, would have created a reasonable probability of a different result on appeal. Accordingly, we deny defendant's application.

{P 2} App.R. 26(B) permits applications for reopening an appeal from a judgment of conviction and sentence based upon a claim of ineffective assistance of appellate counsel. An application for reopening must set forth "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation[ ]" App.R. 26(B)(2)(c). The application "shall be granted if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5).

{P 3} In order to prevail, defendant must establish "a colorable claim" of ineffective assistance of appellate counsel. State v. Lee, 10th Dist. No. 06AP-226, 2007-Ohio-1594, P2, citing

State v. Sanders (1996), 75 Ohio St3d 607. The standard in Strickland v. Washington (1984), 466 U.S. 668, 104 S.Ct. 2052, is applied to determine whether the applicant has established ineffective assistance of counsel. Lee, supra. Strickland requires defendant to demonstrate counsel was deficient for failing to raise the issue he now presents and that defendant had a reasonable probability of success had that issue been presented on appeal. Lee, citing State v. Timmons (Jan. 19, 2006), 10th Dist. No. 04AP-840 (Memorandum Decision).

{P 4} Defendant points to two issues he contends appellate counsel should have raised as ineffective assistance of trial counsel:

> A. Trial counsel failed to object to multiple Crim.R. 16 discovery violations involving: 1) the failure to preserve and produce potentially exculpatory dash camera evidence of Clellan's interrogation after arrest; and 2) the introduction of statements and related testimony by Deputy Felkner despite not being produced to the defense until the second day of trial.
>
> B. Trial counsel submitted an improper proposed jury instruction regarding R.C. Section 2901.05 to the trial court and also failed to object to the trial court's improper

modification of said jury instruction regarding Ohio's "Castle Doctrine" – R.C. Section 2901.05.

A. Discovery Issues

{P 5} Defendant first asserts his appellate counsel should have raised as error trial counsel's not objecting to the state's failure to produce a lost or destroyed police cruiser video and defendant's post-arrest comments to Deputy Felkner.

{P 6} This court in State v. Glunt, 10th Dist. No. 09AP-962, 2010-Ohio-3024, addressed the pertinent law governing lost or destroyed evidence. Courts initially must distinguish "between evidence that is materially exculpatory and that which is only potentially useful." Id. at P9. If the evidence is materially exculpatory, "its suppression violates a defendant's due process rights, and requires dismissal of the charge." Id. By contrast, "if the evidence is only potentially useful, the defendant must show bad faith on the part of the state in order to show that the defendant's due process rights have been violated." Id.

{P 7} Evidence is materially exculpatory if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at P15. Because the video did not capture the activity giving rise to the aggravated menacing charge,

but only to post-incident police activity on arriving at the scene, it does not address the substance of the charge other than through comments of witnesses who were available for trial. The video thus is only potentially useful evidence. State v. Geeslin, 116 Ohio St3d 252, 2007-Ohio_5239, P12 – 13. Accordingly, to support a due process violation, defendant must show bad faith on the state's part. Id at P14. Defendant does not even suggest bad faith. Accordingly, appellate counsel was not ineffective in failing to raise on appeal the lost or destroyed video, as the argument lacks merit.

{P 8} Defendant also suggests appellate counsel should have raised on appeal the state's failure to produce defendant's post-arrest comments to Detective Felkner. Although defense counsel on page 78 of the trial transcript alluded to a "purported statement from our clients that we had not gotten until today," we are unable to conclude, as defendant argues, that the state's failure to produce the "statement" earlier in the proceedings prejudiced him or probably would have resulted in a different outcome at trial by providing evidence that defendant legitimately brandished a weapon. To the contrary, defendant's own testimony suggested he lacked a legal basis for employing a deadly weapon in the circumstances leading to the charge against him, as defendant acted on his own assumption about the nature of the danger the circumstances posed.

B. Jury Instruction

{P 9} Defendant next asserts his appellate counsel should have raised the ineffectiveness of trial counsel in the jury instructions given concerning what generally is referred to as the "Castle Doctrine," embodied in R.C. 2901.05. Defendant contends counsel should have included in his proposed instruction language comparable to that contained in R.C. 2901.05(B)(2)(a) and (b). Both apply to circumstances where the presumption of self-defense in R.C. 2901.05 is rebutted: when the person against whom force is used has a right to be in the home or vehicle and when the person who uses the force is unlawfully in the house or vehicle.

{P 10} Defendant's contentions are unpersuasive. Initially, neither provision defendant points to is supported in the evidence. The trial court is not required to instruct on matters the evidence does not implicate. State v. Scott (1986), 26 Ohio St.3d 92, 101. In addition, any presumption of self-defense was eliminated on the jury's believing the person against whom defendant used force did not attempt to enter defendant's vehicle, a proposition the deputy sheriff testified defendant ultimately admitted was true. As a result, defendant's argument concerning jury instructions fails to support his contention that the additional instructions, with reasonable probability, would have produced a different outcome at trial.

{P 11} Because defendant fails to present a basis for reopening his appeal, we deny his application for reopening.

Application for reopening denied.

KLATT and FRENCH, JJ., concur.

{ B-7 }

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,

: No. 09AP-1043

Plaintiff-Appellee, (MC No. 2009 CRB 2626)

v. : (Regular Calendar)

John Clellan,

:

Defendant-Appellant.

JOURNAL ENTRY

For the reasons stated in the memorandum decision of this Court rendered herein on February 8, 2011, it is the order of this court that the application for reopening, filed on November 15, 2010, is denied. Costs assessed to defendant.

BRYANT, P.J., KLATT & FRENCH, JJ.

By ss//
Judge Peggy Bryant

***NOTE: THE ATTORNEY OF RECORD NEVER RECEIVED NOTIFICATION OF OR A COPY OF THIS DECISION, ALLOWING THE TIME OF APPEAL TO RUN**

{C}

JURY INSTRUCTIONS EXCERPTS

. . .

The defendants are each charged with a count of aggravated menacing. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 4th day of February, 2009, and in Franklin County, Ohio, the defendant knowingly caused another; to-wit, Robert Litchfield, to believe that John Clellan would cause serious physical harm to said other; to-wit, John Clellan pointed a handgun at Mr. Litchfield and stated, "I will kill your ass." (Transcript p. at 310, lines 14 – 22).

. . .

SELF-DEFENSE IN A RESIDENCE OR VEHICLE

" The defendant claims he acted in self-defense or in defense of another. While the burden of proof is always on the defendant to prove self-defense, the law creates a presumption that a person acted in self-defense in certain circumstances. This means that if you find by a preponderances (sic) of the evidence that the following factors are true, you must find that the defendant acted in self-defense and must enter a verdict of acquittal.

(A). The defendant used defensive force;

(B). That the person against whom the defensive force was used was in the process of unlawfully and

without privilege to do so, entering the residence and/or vehicle occupied by the defendant;

(C). 'vehicle' means a conveyance of any kind, whether or not motorized, which is designed to transport people or property;

(D). 'privilege' means any immunity, license or right conferred by law, bestowed by expressed or implied grant, arising out of a status, position, office, relationship, or growing out of necessity." (Transcript p. at 312 & 313, lines 1 – 5).

. . .

Self-defense. Defendant claims to have acted in self-defense. To establish that he or she was justified in acting in using force not likely to cause death or great bodily harm, the defendant must prove by the greater weight of the evidence that he or she was not at fault in creating the situation giving rise to the events that led to the charges of aggravated menacing; (Transcript p. at 313, lines 17 –23).